

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN NATIONAL BANK (a corporation),
Plaintiff in Error,

VS.

BANK OF BANDON (a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Under the rulings of the lower Court the Bank of Bandon was allowed to allege and prove that The American National Bank was negligent; that such negligence was the proximate cause of its loss; that its loss consisted of moneys (\$1600.42) paid out after notice of the acceptance of the draft in question, and also for moneys (\$4287.36) advanced be-

fore December 19, 1913, in anticipation that the draft would be accepted.

The American National Bank, while admitting its negligence in sending to the Bank of Bandon misinformation as to the acceptance of the draft, claimed the right to prove that such negligence only rendered The American National Bank liable, not for *all* of the moneys paid out, but only for the loss of such moneys as the Bank of Bandon was prevented from reclaiming, amounting to \$1600.42, or the difference between \$5887.78 the sum sued for, and \$4287.36. In order to defend this action it was only necessary for the American National Bank to show:

1st. That the Alfred Johnson Lumber Company was virtually bankrupt between the 19th and 29th days of December, 1913. The Bank of Bandon concedes that it was insolvent after the last mentioned date; and

2nd. That if an attachment suit had been commenced by the Bank of Bandon after the draft had been dishonored by the Robert Dollar Company, the result would have been to throw the lumber company into bankruptcy, thereby preventing a recovery of but an insignificant portion of the moneys theretofore paid out and which the draft was intended to cover.

As to the first proposition the evidence is overwhelming to the effect that the lumber company was insolvent. (Record pages 78-80.) The mere statement of its assets and liabilities, without any other

evidence, establishes that fact, for on December 19th the lumber company had liabilities aggregating more than \$147,000.00. Its only asset was a small cargo of lumber of the value of \$12,000.00. It had no credit. It could get no more money from the Robert Dollar Company, nor could it get any funds from the Bank of Bandon, except upon the draft in question. Nor is there any evidence that it had any source of income whatsoever. These matters of themselves stand out in the record with great prominence, and are sufficient in and of themselves to show that a judgment, in favor of the Bank of Bandon, or any other large creditor, against the lumber company, would have resulted in bringing that company into the bankrupt Court.

But, in order to make a better defense The American National Bank was willing to go a step further and prove by the Robert Dollar Company, that as a creditor of the lumber company, to the extent of more than \$107,000.00, it would have forced the latter company into a court of bankruptcy, if any attempt had been made by the Bank of Bandon to obtain a preference by means of an attachment suit. It is incredible that any sane person, similarly situated, would have acted differently. Nor would it be difficult to believe that all of the principal creditors of the lumber company would have taken steps to protect their interests, if the Robert Dollar Company had been indifferent in that respect. And then, what would have happened? It would not have been possible for the Bank of Bandon to

have subjected the little cargo of cedar, amounting only to \$12,000.00, to its own claim; and if the cargo of cedar could not have been so seized, how is it possible to hold that the moneys advanced upon the draft, prior to the time the Robert Dollar Company ever saw it, could be reclaimed by the Bank of Bandon?

The lower Court, however, while deeming it perfectly proper to allow the Bank of Bandon to state that it would have protected itself by means of an attachment suit, denies to The American National Bank the correlative right to produce evidence to the effect that it likewise would have protected itself by blocking such action by the Bank of Bandon by means of bankruptcy proceedings. (Record pages 62, 68, 82.)

The attitude of the lower Court in the premises served to prejudice the rights of The American National Bank in the eyes of the jury. The jury was impressed with the idea that the question of the insolvency of the lumber company was of no importance, and that it did not make a particle of difference what the proximate cause of the loss was. The jury lost sight of the principle of law involved in the case, namely, that the liability of The American National Bank is based solely upon its negligence, by which the Bank of Bandon lost its money.

The American National Bank, if liable at all to the Bank of Bandon, is liable only in damages caused by its negligence, but if, in spite of its negligence, the Bank of Bandon would have lost the

moneys so advanced by it in any event, then it is too plain for argument that The American National Bank is not responsible for the loss sustained by the Bandon Bank, for it must always be borne in mind that this cause of action must establish the proximate cause of the loss sustained by the Bank of Bandon, for, if, notwithstanding the conduct of The American National Bank in giving to the Bank of Bandon misinformation concerning the acceptance of the draft, the condition of the Bank of Bandon would have been precisely the same, this action cannot be maintained.

A great deal has been said in the brief of counsel concerning the principles of the law merchant, and the liability of endorsers, and those who place their names on commercial paper, and certain sections of the Civil Code have been referred to, but they throw no light upon the underlying principles of law which govern the rights of the parties in this case. Those principles are not to be found by resort to the law merchant alone, but they are to be found in those cases where the courts have had occasion to consider damages that result from negligence of a collecting bank in handling commercial paper for other banks.

We repeat the argument set forth in our brief to the effect that, all of the authorities are unanimous upon the proposition that, notwithstanding a collecting bank may be negligent in handling a bill of exchange, yet, that when recovery is sought against such negligent bank by a party to the exchange, the amount of such recovery is limited to

the *actual damage* sustained, and if there could be no recovery upon the paper, anyway, by reason of the insolvency of the party against whom recovery might be had, but for such negligence, then there can be no recovery against the negligent bank.

This is clearly expressed in 3 Ruling Case Law, Sec. 260, where it is said:

“It is a fundamental principle that negligence on the part of an agent in the transaction of the business of his principal will not render him liable for damages unless his negligence results in an actual injury to his principal. And as a corollary the damages recoverable by a principal for the negligence of his agent are the actual loss which the principal has suffered. So it would seem to follow that a recovery for the negligence of a collecting bank resulting in a failure to make the collection should be limited to the actual loss suffered by its customer. So it has been held that where a bank receives a cashier’s check on the drawee bank for collection, it is not necessarily liable for the face value of the check on account of its negligence in presenting the check for payment, as where the drawee bank becomes insolvent after the negligence of the collecting bank, and there are assets in the hands of a receiver for distribution from which a dividend for creditors has been declared. And where the collecting bank has been negligent in the collection of paper entrusted to it, the customer must allege and prove the amount of damages he has suffered. On the other hand this is authority for the position that the onus is on the bank when sued for neglect, in failing to give notice of demand and payment, and of protest of the note intrusted to it for collection, to show that its principal has incurred no damage from its neglect.”

This brief statement of the law is supported by authorities from many jurisdictions. They were all cited in our brief. (Pages 28-29.)

The same conclusion is succinctly stated in 5 Cyc., 511:

“The measure of damage is the actual loss resulting from the collector’s omission of duty.”

This statement is also supported by ample authorities.

So, in this case, by reason of the attitude of the judge of the trial Court, by reason of the rulings upon the offered evidence, and by reason of the instructions given and refused, all as pointed out in our brief, and herein, plaintiff in error was prevented from showing that notwithstanding it was, in the first instance, negligent in handling the draft, yet, that the loss of defendant in error would have occurred anyway, on account of the actual insolvency and bankruptcy of the Johnson Company. And furthermore that the loss of at least \$4287.36 was occasioned solely and only by the act of the Bank of Bandon in paying out that sum, before the draft ever reached the plaintiff in error.

The practical effect of the decision is to hold plaintiff in error responsible for the full loss in the very teeth of this law and the actual facts of this case.

In this connection we ask the Court to review what was said in

Hendrix v. Jefferson County Savings Bank,
14 L. R. A. (N. S.) 687.

“As to the liability of a collecting bank for negligence in presenting or giving notice of dishonor of paper in its hands for collection, there has been much discussion in the courts. Even so great an authority as the pathfinder in American law, Chief Justice Marshall, remarked that ‘by failing to demand payment in time the bank would make the bill its own, and would become liable * * * for its amount.’ (Bank of Washington v. Triplett, 1 Pet. 25, 31, 7 L. Ed. 37, 40); but that case was decided on another principle, and our own court in an early case, which has become a leading one, shows that the learned Chief Justice ‘was not preparing to discuss the general rule,’ and that the facts of that case did not call for the remark, and held that in such a case the collecting bank is liable only for the actual loss which the owner of the bill sustained by reason of the negligence of the collecting bank. Bank of Mobile v. Huggins, 3 Ala. 206, 215, et seq. That was a case in which it was claimed that the failure to give notice had discharged the indorser, and the Court held that the discharge of a solvent party is not an actual loss when there are other solvent parties bound, and that it rests with the principal to show, before he is entitled to recover the amount of the note as damages, that the parties who remain are unable to pay. *Id.*, headnote 6, and pages 220, 221.

When the present case was before this Court at a previous term, the court said: ‘It by no means follows, from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the paper, whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even any part of it.’ etc.; and also: ‘It will, therefore, not suffice for the owner to hail the collector bank into court and

implead that—you took this check to collect it, you did not do your duty in that regard, and of consequence the check was not collected; therefore the check is yours, and the amount of it in money is mine, and in your hands for me, and you must pay me that amount.—Hence it was held that counts 7 and 8 were ‘so wanting in averments of damages suffered by plaintiff as to state no cause of action.’ *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 1 L. R. A. (N. S.) 246, 39 So. 295, 296. In the case as presented to the Court now, said counts 7 and 8 were remodeled so as to state that ‘the assets of said bank are insufficient to enable him to collect therefrom, by dividends or otherwise, the full amount of said check, with interest,’ and that he will lose a large part, to wit, \$1,000.

This case is also reported in 1 L. R. A. (N. S.) 246, and the annotator submits an extended note, citing many cases to the effect that the burden is upon the plaintiff to allege and prove what damage he has suffered by reason of the negligence of the collecting bank, and particularly calling attention to the fact that the remark in *Daniel on Negotiable Instruments* ‘that loss is prima facie the amount of the bill or note’, etc., is not supported by the authorities cited by that author. In the case of *Allen v. Suydam*, 17 Wend. 368, the supreme court of New York held that, where the agent was guilty of negligence in regard to presentment and notice, he was liable in damages to the full amount of the bill; but our own court criticised that case and refused to follow it, saying: ‘It is difficult to conceive how a mere agent, who is intrusted with the paper only for one specific purpose, in no ways coupled with any interest, can be held to proof of those circumstances on which its value or its worthlessness depend.’ *Bank of Mobile v. Huggins*,

3 Ala. 219. Subsequently that case went to the court of errors and appeals of New York, and was reversed on the question of damages; the court holding that the jury should have been instructed 'to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay'. *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555, 563.

It is true that it is stated in *Sutherland on Damages* that, 'if there is negligent delay by an agent in presenting a bill for acceptance, and the antecedent parties, though not thereby discharged from their legal liability, in the meantime become insolvent, the amount of the bill is *prima facie* the loss' (p. 2372); and there are authorities which use this expression. It is also true that the writer of the notes to *Sutherland on Damages* indicates that he agrees with the dissenting opinion of Senator Verplanck in *Allen v. Suydam*, 20 Wend. 334, 32 Am. Dec. 555; 3 *Sutherland, Damages*, 3d ed., p. 2372, Sec. 775, note 3; *Merchants State Bank v. State Bank*, 94 Wis. 444, 69 N. W. 170; *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 79 N. W. 859. It is probable that the word 'insolvent' in these authorities is used in its ordinary sense, to show that nothing can be collected from the parties remaining on the bill, so that the principle would not apply to a case where the estate of the party liable is in the hands of the bankrupt court, with some funds to be administered. However, in accordance with the weight of authority, and especially in view of the positive position taken by our own court, we hold that the measure of damages is the actual loss sustained, and that it is a part of the plaintiff's case to allege and prove the amount of loss. We understand this to be the effect of the decision in this case when previously here; and

the amended counts alleging the insufficiency of the assets of the bankrupt estate should have been sustained by proof.

Again, even if the prima facie theory should be adopted, yet it would not change the result in this case, because the evidence shows as a matter of fact that there were assets of the bankrupt bank subject to the payment of this check, that dividends to the amount of 44 per centum had been declared, and still there were assets. The payee of the check was still the owner of it, and entitled to that dividend and any others that might follow. He should have gone on and proved what would probably be the entire dividend to which he would be entitled. Certainly the Court could not say that he was entitled to the full face value of the check, when, for all that appears from the evidence, he may have already collected 44 per cent of it, and there was no evidence before the Court from which it could ascertain what the amount of the actual damage was.

It cannot be said that it was the duty of the collecting bank to prove up the claim in bankruptcy and collect the dividends. It was agent only to present and collect the claim from the bank, and when it presented it, and gave notice of its dishonor, and charged it back to the drawer, the paper was the property of the drawer, and no one else could file it in the bankrupt court. 3 Am. & Eng. Enc. Law, 2d ed., p. 817. Neither is there any force in the contention that the defendant made the check its own because it did not return it to the plaintiff, as the evidence shows that the check was in the possession of the receiver in bankruptcy."

Again, in a note to Jefferson County Savings Bank v. Hendrix, 1st L. R. A., page 246, it is said:

“The measure of damages for the neglect of a collecting bank to fix the liability of an indorser by notice of demand and non-payment is said, in *Borup v. Nininger*, supra, to be the face of the note; but the court adds: ‘The plaintiff must make out the insolvency of the maker, and the solvency of the indorser, discharged by the act of the defendants. The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff’s damages.’ Citing *Sedgw., Damages*, 340 et seq.; *Howard v. Garner*, 3 Sandf. 179; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Allen v. Merchants Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555. To the same effect is *West v. St. Paul Nat. Bank.*, 54 Minn. 466, 56 N. W. 54.”

The case of *Brown v. People’s Bank*, 52 L. R. A. (N. S.) 608, contains a very instructive note on the necessity of proving damage in cases of this kind. It was there said, quoting from page 661, that

“Notwithstanding the default or breach of duty of a collecting bank in dealing with a draft with bill of lading attached, it may, when sued for damages, show in defense, either that no damage resulted, or that the actual damage was less than the face of the paper. Citing *Second National Bank v. Bank of Alma*, 99 Ark. 386, 138 S. W. 472. * * *

If the drawers of an inland bill of exchange are insolvent and have no credit with the drawee, the negligence of a bank employed by the holder to present it for acceptance and

collect it when due does not entail damage. Crawford v. Louisiana State Bank, 1 Mart. N. S. 214. * * *

While it is negligence in a bank employed to collect a draft from drawees at a distance to send it direct to such drawees for payment and returns, nevertheless, if it be established that such draft would not have been paid had other agents been selected to present it, no damage has resulted from such negligence, and the bank escapes liability."

From the foregoing authorities, it is apparent that the admitted negligence of The American National Bank did not contribute proximately or remotely to all the loss sustained by the Bank of Bandon. It is conceded that the negligence of The American National Bank might have been the cause of the loss to the Bank of Bandon of all moneys (\$1600.42) paid out by it subsequent to the 19th day of December, 1913, the date when The American National Bank first received the draft in question, but the authorities do not support the contention of counsel for defendant in error that The American National Bank is liable for moneys advanced (\$4287.36) by the Bank of Bandon prior to said last mentioned date.

It is respectfully submitted that the petition for a rehearing of this case should be granted.

Dated, San Francisco,

April 14, 1917.

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and Petitioner.*

CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for plaintiff in error and petitioner in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDGAR C. CHAPMAN,
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and Petitioner.*